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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CONTINENTAL CASUALTY COMPANY, Plaintiff and Respondent, v. TRAVELERS CASUALTY AND SURETY COMPANY, Defendant and Appellant.	B167217 (Los Angeles County Super. Ct. No. EC032595)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura A. Matz, Judge. Affirmed.

Anderson, McPharlin & Conners, David T. DiBiase, Michael S. Robinson; Lambert & Weiss, Arthur N. Lambert, and M. Diane Duszak, for Defendant and Appellant.

Selman Breitman, Neil H. Selman, Jan L. Pocaterra, and Robert G. Soper, for Plaintiff and Respondent.

Travelers Casualty and Surety Company (Travelers) appeals the summary judgment establishing that Continental Casualty Company (Continental) did not bear a joint obligation to defend Warner Brothers, *The Jenny Jones Show* and Telepictures (collectively Warner) in an underlying action. Because there are no triable issues as to the duty to defend, we affirm.

FACTS

The two insurance policies

Time Warner, Inc. obtained a general liability policy from Travelers and an entertainment risk policy from Continental (the policy) that provided coverage for errors and omissions.

In part I.A.1. of the policy, Continental promised to defend Time Warner, Inc. against liability for damages resulting from any claim seeking damages arising out of "invasion or interference with rights of privacy or publicity, including but not limited to false light, public disclosure of private facts, intrusion upon seclusion, and commercial appropriation of name or likeness." Part I.A.2. provided coverage for "[l]ibel, slander or other torts to the extent based upon disparagement or harm to the character or reputation of any natural person or entity, including but not limited to product disparagement, trade libel, infliction of emotional distress, prima facie tort, outrage, or outrageous conduct; [¶] . . . [¶] committed in the utterance or dissemination of Matter by the Insured in the Business of the Insured."

Part II.J. of the policy provided that Continental shall have "no obligation to . . . defend . . . any Claim: [¶] . . . [¶] J. For or arising out of Bodily Injury . . . unless caused by the perils listed" in parts I.A.1. and I.A.2.

Bodily injury is defined in the policy as "physical injury, sickness, or disease including death."

The coverage dispute

On March 6, 1995, Scott Amedure (Amedure) and Jonathon Schmitz (Schmitz) participated in the taping of *The Jenny Jones Show*.[1] During the show, Amedure revealed that he had a secret crush on Schmitz. Three days later, due to his outrage over the incident, Schmitz shot and killed Amedure.

The Estate of Scott Amedure (the Estate) sued Warner in Michigan for contributing to Amedure's death (the Amedure action). In its second amended complaint (the Amedure complaint), the Estate sued Warner for negligence, gross negligence and willful and wanton misconduct. The Estate alleged: Warner procured Schmitz's presence on the show by telling him that he had a secret admirer. Though Schmitz said he would not participate if his secret admirer was a man, Warner concealed Amedure's gender. The purpose of the show was to sensationalize Amedure's same sex crush on Schmitz, and the intent "was to scandalize, embarrass and humiliate [Schmitz]." Warner should have known that its conduct could incite Schmitz to violence such that Amedure "was unnecessarily placed in a precarious and dangerous position." Warner subjected Amedure to a threat of violence from Schmitz by, inter alia: (1) engaging in "extreme and outrageous conduct" to intentionally or recklessly cause Schmitz severe emotional distress; (2) misleading Schmitz about the content of the show and "purposefully disregarding his expressed instructions that he would not want a man telling him o[n] television" of a same sex crush; (3) creating a situation that would humiliate, embarrass and mortify Schmitz; and (4) failing to warn Amedure of the risk.

In part, the Estate sought damages for the "pain and suffering, including mental anguish, fright, shock, sorrow, hysteria and anxiety, endured by [Amedure] during the interim of time extending between the . . . wrongful acts [of Warner and Schmitz], and [Amedure's] ultimate death."

Travelers provided a defense and Continental did not.

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[1] As alleged, Telepictures produced *The Jenny Jones Show* and is owned by Warner Brothers, which is owned by Time Warner, Inc.

The jury awarded the Estate over $29 million in damages. That judgment was eventually reversed on appeal in *Graves v. Warner Bros.* (Mich.Ct.App. 2002) 656 N.W.2d 195, 202 (*Graves*).

This action

Continental filed suit seeking a declaration that it did not owe Warner a defense in the Amedure action.

Travelers cross-complained for declaratory relief, equitable subrogation, contractual subrogation, reimbursement, equitable contribution and estoppel. The core contention was that Continental owed a defense and was obligated to contribute to the defense costs.

Both parties sought summary judgment or adjudication.

After taking the matters under submission, the trial court granted Continental's motion. The minute order detailed the trial court's reasoning thusly: In essence, the Amedure complaint alleged that Warner "engaged in extreme and outrageous conduct intentionally or recklessly to cause severe emotional distress to Schmitz and in doing so foreseeably subjected Amedure to bodily harm from Schmitz. No cause of action for either libel, slander[,] intentional infliction of emotional distress or outrageous conduct is asserted" by the Estate. "Travelers argument that the 'arising out of' language of the policy . . . is broad enough to cover a claim of bodily injury to Amedure which arises out of the distress caused to Schmitz by [Warner] is persuasive at first glance." However, the "switch of language from 'arising out of' to 'caused by' signals to the [trial] court that the parties intended 'legal cause' or 'proximate cause' when the more restrictive phrase 'caused by' was used. Here, Amedure's bodily injury, or death, was not proximately or legally caused by [Warner's] actions. It was caused by the intentional criminal act of homicide committed by Schmitz."

The trial court went on to state: "To the extent it can be argued that the policy language is ambiguous in this context, the court is instructed by case law to look to the reasonable expectations of the insured and believes an insured would not reasonably

expect coverage under [the policy] for an action that is, for all intents and purposes, an action for wrongful death."

As well, the trial court indicated that the Amedure complaint did not state enough facts to demonstrate harm to Amedure's character or reputation or to recover for Amedure's emotional distress. As for intrusion into seclusion or false light, the trial court pointed out that there was no allegation that Amedure was subjected to hatred, contempt, ridicule or obloquy. "Because Amedure was openly gay and did what he did willingly because he wanted to appear on the show, it is difficult to see why Continental . . . should interpret these facts as potentially giving rise to a false light claim. Moreover, [the Estate] could not have recovered damages for false light or public disclosure claims under the Michigan wrongful death statute which forms the basis for its recovery. At best, the [Estate] could recover for Amedure's pain and suffering, while conscious, during the interval between the time of injury and the time of death. Here there are no facts alleged to suggest that the 'injury' which commenced the period of pain and suffering could be anything other than the gun shot wound. While damages for harm to his reputation or character might have been recoverable under other statutes available to the [Estate], the court does not believe the law requires Continental to speculate as to how (or whether) the [Estate] could have (would have) amended the complaint to seek and/or recover such damages."

Judgment was entered for Continental.

This timely appeal followed.

DISCUSSION

An appellate court independently assesses the propriety of summary judgment or summary adjudication. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Moreover, it will uphold the trial court if it is correct on any theory. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 960-961.)

We turn to our analysis.

I

The Law

Our point of analytical departure is the duty to defend, a topic which has received extensive treatment in appellate opinions. "A liability insurer owes a duty to defend its insured when the claim creates any potential for indemnity. [Citation.] The determination of whether the duty to defend arises is made by comparing the terms of the policy with the allegations of the complaint and any known extrinsic facts, and any doubt as to whether the facts create a duty to defend is resolved in favor of the insured. [Citation.]" (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 413-414.) An insured can defeat an insurer's bid to avoid a defense duty merely by demonstrating a potential for coverage. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.) The same rules apply when one liability insurer is attempting to prove that a second liability insurer owed the insured a duty to defend. (See *Maryland Casualty Co. v. National American Ins. Co.* (1996) 48 Cal.App.4th 1822, 1831-1832.)

When analyzing a pleading to determine whether it gives rise to a duty to defend, a court must be mindful that "it is not the form or title of a cause of action that determines the carrier's duty to defend, but the potential liability suggested by the facts alleged or otherwise available to the insurer." (*CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 609.) Any doubts regarding the duty to defend must be resolved in favor of the insured. (*Id*. at p. 607.)

As Travelers itself states: "The duty to defend upon unpleaded causes of action stems from the facts actually alleged, not from speculation about other facts that may or may not exist." The case Travelers cites for this proposition, *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, is instructive. It stated: "An insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend its complaint at some future date. This approach misconstrues the principle of 'potential liability' under an insurance policy. 'Although an insurer's duty to defend is broader than the duty to

indemnify, the duty to defend depends upon *facts* known to the insurer at the inception of the suit. [Citations.] . . . [¶] Our Supreme Court, anticipating imaginative counsel and the likelihood of artful drafting, has indicated that a third party is not the arbiter of the policy's coverage. [Citations.] A corollary to this rule is that the insured may not speculate about unpled third party claims to manufacture coverage.' [Citation.]" (*Id*. at p. 1114.)

II

There was no Duty to Defend

Travelers argues that the Amedure complaint raised potential claims for invasion of privacy, intentional infliction of emotional distress and outrageous conduct as to both Amedure and Schmitz. According to Travelers, these potential claims required Continental to provide a defense because they led to Amedure's death, and they show injury to Amedure's reputation. These contentions lack merit because the Amedure complaint lacked sufficient allegations to establish that these potential claims existed and could have been stated by the Estate in an amended pleading. Moreover, the policy did not cover negligence, which was the only theory upon which Warner could have been liable for Amedure's death.

A. <u>Part I.A.1. of the policy (invasion of privacy)</u>.

Travelers contends that the Amedure action indicated the existence of two potential invasion of privacy claims, namely intrusion into seclusion and false light, as to Amedure and Schmitz.

We disagree.

As we shall demonstrate, the Amedure complaint did not contain sufficient facts to suggest potential claims for invasion of privacy. In any event, as to Schmitz, the Estate had no standing to assert his claims. Injury to a stranger to the litigation was not the type of risk that triggered a duty to defend.

1. *Intrusion upon seclusion*.

The policy provides coverage with respect to any claim seeking damages arising out of, inter alia, intrusion upon seclusion. Intrusion upon seclusion is actionable in

Michigan. (See *Tobin v. Michigan Civil Service Commission* (Mich. 1982) 331 N.W.2d 184, 189.) As stated by *Tobin*: "'Intrusion as a branch of the right to privacy has three elements: (1) the existence of a secret and private subject matter; (2) a right possessed by plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter by defendant through some method objectionable to the reasonable man.' [Citation.]" (*Id.* at p. 189.)

a. Amedure.

The allegations in the Amedure complaint are contained in 43 numbered paragraphs. Paragraph 25 alleges that prior to the show Schmitz was unaware of Amedure's "'same sex crush.'" This allegation suggests a secret subject matter which Amedure had every right to keep private. But the Amedure complaint does not suggest that the information was obtained in an objectionable manner. In fact, it is silent as to how the information was learned. There was no need for Continental to speculate on this point. Consequently, the Amedure complaint did not suggest potential intrusion upon seclusion liability. In any event, it is apparent Amedure had no intention of keeping his crush secret. He went on *The Jenny Jones Show* for the express purpose of revealing his amorous feelings.

b. Schmitz.

The policy provided a defense to Warner against liability for damages imposed by law resulting from any claim seeking damages arising out of invasion of privacy. Also, part I.A.2. of the policy applied to injury to the reputation of "any natural person." Based on this, Travelers argues that Warner was entitled to a defense if it committed an invasion of privacy tort against Schmitz (who fits the bill of "any natural person"), and if Amedure's death arose out of that tort. We agree that the language is broad. However, the Amedure complaint did not seek to recover Schmitz's damages, nor could it. Therefore, there was no potential for liability, and therefore no duty to defend, as to any claims potentially associated with Schmitz.

Assuming, arguendo, we were required to consider whether the Amedure complaint revealed a potential intrusion upon seclusion claim as to Schmitz, we would

answer in the negative. Even if Schmitz had a right to keep secret his lack of interest in another man, he revealed that information voluntarily. Hence, Warner could not have been potentially liable.

2. *False light*.

False light is also recognized in Michigan. (See *Porter v. Royal Oak* (Mich.Ct.App. 1995) 542 N.W.2d 905, 909.) "In order to maintain an action for false light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." (*Id*. at p. 909.) Additionally, the defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. (*Detroit Free Press v. Oakland Cty. Sheriff* (Mich.Ct.App. 1987) 418 N.W.2d 124, 129.)

a. Amedure.

The Amedure complaint did not satisfy the elements as to Amedure. It alleged that Warner solicited Amedure's participation on *The Jenny Jones Show* in order to reveal his same sex crush on Schmitz. It also alleged that Amedure was "encouraged to create fantasies involving" Schmitz and then told to "sensationalize his 'same sex crush' during the production of the show" and kiss Schmitz or give him flowers and a hug. Moreover, according to the Amedure complaint, Warner provided Amedure with alcohol prior to the show in order to reduce his inhibitions and "increase the likelihood of scandalous conduct intended to humiliate and/or embarrass" Schmitz.

The problem is that there are no allegations that Warner attributed characteristics, conduct, or beliefs to Amedure that were false and placed him in a false position. In fact, there is no allegation that Amedure acted in the manner desired by Warner. Even if he had acted in the manner desired by Warner, and even if he had been thereby cast in a false light, the only person responsible would have been Amedure himself. Once again, Continental was not required to speculate as to whether Warner had committed other acts that might be actionable.

b. Schmitz.

We reiterate that the Estate lacked standing to pursue damages that Schmitz may have suffered, so there was no potential for liability.

Academically, we fail to see how Schmitz was portrayed in a false light. According to Travelers, "Schmitz's appearance on the show implied that he knew of its 'same sex admirers' theme and was receptive to sexual advances from another man. Neither was the case." Of particular note here is that Travelers must speculate to make its statement. The Amedure complaint never alleged that Schmitz was misrepresented to the public.

B. Part I.A.2. of the policy (torts based on injury to reputation).

Below, the parties disputed whether torts covered by part I.A.2. of the policy had to be based on injury to reputation. Because the trial court did not reach this issue, we asked the parties to provide letter briefs. After reviewing the letter briefs, we conclude that injury to reputation is necessary and that there were no allegations to that effect in the Amedure complaint.

1. *Injury to reputation was required*.

In its letter brief, Travelers properly states that the issue "is whether the clause [in part I.A.2.] 'to the extent based upon disparagement or harm to the character or reputation of any natural person' modifies only the immediately preceding phrase 'or other torts,' or should also be taken to modify the perils 'infliction of emotional distress, prima facie tort, outrage, [and] outrageous conduct,' listed in the following clause."

The language in the agreement is clear. The phrase "to the extent based upon disparagement or harm to the character or reputation of any natural person" modifies every tort listed in part I.A.2. This is established by the phrase "other torts" in the first clause and the word "including" in the second clause. Only by twisting the language can another meaning be found.

Further bolstering this reading is the greater context of the agreement. For example, in part I.A. Continental promised to insure Warner against claims arising out of such wrongs as invasion of privacy, copyright infringement, piracy, unauthorized use of

names, breach of implied contract arising out of the alleged submission of any newsworthy or other material, and failure to give credit on an insured production. Other parts of the insuring agreement cover claims based on such wrongs as eavesdropping and dissemination of material in violation of a court order. Beyond that, Continental agreed to pay attorneys fees "arising in the Filmed Entertainment and Programming-HBO Businesses" of Warner.

What one quickly gleans is that the agreement is not a comprehensive general liability policy. Instead, it generally protects against claims for damages related either to the misrepresentation or misuse of written, verbal or visual information, or to wrongful acts committed while gathering information. Therefore, it would be inconsistent with the rest of the agreement if part I.A.2. provided coverage for outrageous conduct or intentional infliction of emotional distress unless those torts involved some sort of information related injury.

2. *No injury to Amedure's or Schmitz's reputation was alleged*.

Though the Amedure complaint alleges that Warner intended to create an audience reaction that included ridicule, there is no allegation that the audience ridiculed Amedure or Schmitz and that their reputations were injured because they appeared on the show. This is fatal to Travelers' position, which spares us from the task of determining whether the Amedure complaint contained potential claims for intentional infliction of emotional distress or outrageous conduct. Based on the pleading, the policy did not give rise to a duty to defend.

In any event, as to Schmitz, whatever damages he may have suffered were not actionable by the Estate.

Travelers revealed the weakness of its position in its letter brief. It stated that "the [Amedure complaint] alleges that the insureds manipulated Schmitz and Amedure into a situation that caricatured or misrepresented their nature and identity in a manner that exposed each of them to audience 'ridicule, outrage [and] hysteria.' . . . Reading such allegations in favor of coverage, as the insurer is obliged to do, it can fairly be maintained that neither victim could emerge from this public exposure with his reputation

unharmed." Aside from the fact that the Amedure complaint never alleged that anyone ever actually ridiculed Schmitz and Amedure, the second part of Travelers' assertion is pure speculation. Continental was not required by the policy to speculate in kind.

C. Continental did not owe a defense with respect to Amedure's death.

We note that the Estate sought to hold Warner liable for the criminal conduct of Schmitz. Any other aspect of the case -- either actual or potential -- was de minimis or nonexistent. Therefore, it bears stressing that the policy did not afford coverage for negligence[2], yet the only way a civil defendant in Michigan can be liable for the criminal act of a third party is by breaching a duty of care and being negligent. (See *Graves*, *supra*, 656 N.W.2d at pp. 202-203.) Consequently, if Warner was entitled to a defense against the Estate's negligence action for wrongful death, then it was solely through Travelers' general liability policy.

DISPOSITION

The judgment is affirmed.

Continental shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P.J.
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_____, J.
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2 Travelers conceded this point at oral argument.